A

ABDUL MANAP AHMAD

v.

WERSUAH AMOON

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S6-24-1510-2005]
1 JANUARY 2006

C ***TRUSTS:*** *Resulting trust - Purchase of property by plaintiff - Defendant holding a 50% share of property on trust for plaintiff - Whether a resulting trust in plaintiff's favour existed - Whether plaintiff sole beneficiary*

D By way of an originating summons in encl. 1, the plaintiff sought the following prayers: (i) a declaration that he was the legal and beneficial owner of certain property ('the property'); (ii) a declaration that the defendant held a 50% share of the property on a resulting trust for the sole benefit of the plaintiff; (iii) an E order that the defendant transfer her 50% share of the property to the plaintiff; and (iv) that the costs of this application be borne by the defendant. The plaintiff had discovered that the defendant had prepared a transfer form in respect of the 50% share of the property in her name to be transferred to one Sahar Abdul F Manap. The plaintiff, however, informed the defendant that he was not agreeable to the transfer since the 50% share of the property in the name of the defendant was held on trust for the plaintiff as the sole beneficiary. The only discernible issue requiring determination was whether the plaintiff had satisfied the burden of G proof that there was a resulting trust in favour of the plaintiff.

Held (allowing the plaintiff's application):

(1) The plaintiff had proved payment in respect of the property in order to establish the existence of a resulting trust, in light of H the following facts of the case: (a) the plaintiff withdrew RM100,000 from the Kumpulan Wang Simpanan Pekerja in favour of the developer; (b) the plaintiff and the defendant, on the one part, executed a loan agreement with Citibank, on the other part, for a loan of RM15,000 in order to enable the I plaintiff to complete the purchase of the property; (c) that pursuant to the loan agreement, the plaintiff was required to make monthly payments of RM248.37 one month after the

date of the whole of the loan being fully released by Citibank to the developer; (d) that Citibank duly disbursed the sum of RM15,000 to the developer whereupon the plaintiff commenced honouring the monthly payments of RM248.37 pursuant to the terms and conditions of the loan agreement, as evidenced by the monthly receipts issued by the said bank; (e) that the plaintiff on his own accord issued a final lump sum payment in the amount of RM5,500 as full and final settlement of the loan amount to the said bank; and (f) that at no time did the defendant contribute any monies whatsoever to the payment of the purchase price of the property nor did the defendant make payments of RM248.37 on a monthly basis in respect of the loan agreement. Therefore, there was a resulting trust in existence in respect of the property to which the plaintiff was the sole beneficiary. (paras 17 & 18)

[Order in terms of originating summons in encl. 1 granted]

Case(s) referred to:
Dyer v. Dyer [1788] 2 Cox Eq 92 ***(refd)***
Harrison v. Croydon London Borough Council [1968] Ch 479 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Re Barnato [1949] Ch 258 ***(refd)***
Re Scottish Equitable Life Assurance Society [1902] 1 Ch 282 ***(refd)***
Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd [1921] 2 AC 438 ***(refd)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 ***(refd)***
The Venture [1908] P 218 ***(refd)***
Webster v. Southwark LBC [1983] QB 698 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 10 rr. 1, 5

Other source(s) referred to:
Words And Phrases Legally Defined, vol 4: R-Z, p 337

For the plaintiff - Sunil Abraham; M/s Shearn Delamore & Co
Defendant - Absent

Reported by Suresh Nathan

A

JUDGMENT

Abdul Malik Ishak J:

Introduction

B **[1]** By way of an originating summons in enclosure one (1), the plaintiff sought for the following prayers:

(1) A declaration that the Plaintiff is the legal and beneficial owner of Lot No: 11506, Plot 283, Level 1, Building M8, Mukim Ampang also known as A8-0-7, Desa Pandan, 55100 Kuala Lumpur;

C

(2) A declaration that the Defendant holds a 50% share of Lot No: 11506, Plot 283, Level 1, Building M8, Mukim Ampang also known as A8-0-7, Desa Pandan, 55100 Kuala Lumpur on resulting trust for the sole benefit of the Plaintiff;

D

(3) For an Order that the Defendant do transfer her 50% share of Lot No: 11506, Plot 283, Level 1, Building M8, Mukim Ampang also known as A8-0-7, Desa Pandan, 55100 Kuala Lumpur to the Plaintiff within 21 days from the date of judgment of this Honourable Court in favour of the Plaintiff;

E

(4) That the costs of this application be borne by the Defendant; and

(5) Such other relief as this Honourable Court deems fit and proper.

F

[2] The first two prayers are in the nature of a declaration. The third prayer seeks for an order as stated therein. It is said that declaratory judgments are useful to settle disputes before they reach the point where a particular right is infringed (Woolf and Zamir, *The Declaratory Judgement*, 2nd edn; PW Young, *Declaratory Order* (1975)). In essence, a declaratory judgment merely states the rights or legal position of the parties as they stand in the eyes of the law, without changing them in any way. Of course, in a suitable case, it may be supplemented by other remedies. Standing alone, a declaratory judgment merely states an existing legal situation. It does not require anyone to do anything and to disregard it will not be in contempt of court (*Webster v. Southwark* LBC [1983] QB 698 – where the court there approved the issue of a writ of sequestration against the property of councillors who in deliberate breach of a statutory duty had refused the use of a hall for an election meeting of a National Front candidate and that the court order was merely declaratory since it was assumed that it would be respected, otherwise, a compulsory order might have

G

H

I

been granted). A declaratory judgment enables a party to know his legal position and it opens the way for him to use other remedies in order to give effect to it. A declaration is a discretionary remedy. The court has ample jurisdiction to prevent its abuse and the court too has the inherent power to refuse relief to speculators and busybodies and to those who merely seek to ask hypothetical questions (*Re Barnato* [1949] Ch. 258; and *Harrison v. Croydon London Borough Council* [1968] Ch. 479). In the words of Lord Dunedin in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* [1921] 2 AC 438 at 448 (summarising Scots law applicable in England):

> The question must be real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.

[3] In a nutshell, it means this. That there must be a genuine legal issue between the proper parties. Here, all these legal ramifications would certainly apply in aid of the plaintiff.

The Undisputed Facts

[4] At the outset, it is germane to mention that the defendant has failed to enter an appearance and the defendant too has failed to file an affidavit in reply. With these infirmities, the averments in the plaintiff's affidavit in support are certainly undisputed. I will now proceed to narrate the undisputed facts.

[5] In the year 1986, the plaintiff decided to purchase an apartment so as to provide his mother-in-law from his first marriage with a place to stay. The plaintiff's mother-in-law from his first marriage is in fact the defendant's mother. It was for this reason that the plaintiff decided to include the defendant as a co-owner of an apartment on the understanding that the defendant would hold a 50% share of the property on trust for the plaintiff and care for the plaintiff's mother-in-law.

[6] On or about 8 August 1986, the plaintiff and the defendant, on the one part, as co-purchasers in name executed a sale and purchase agreement with Pandan Maju Sdn Bhd (hereinafter referred to as the "developer"), on the other part, for the purchase of an apartment identified as Unit No: 7, Ground Floor, Block A8, Desa Pandan in the Mukim of Ampang, in the State of Wilayah Persekutuan (hereinafter referred to as the "property") in the sum of RM25,000.

[7] Pursuant to the terms and conditions of the sale and purchase agreement, the sum of RM25,000 was to be made payable to the developer. The plaintiff then took the following steps to effect payment of the purchase price to the developer:

(a) the sum of RM10,000 was withdrawn from the plaintiff's account with the Kumpulan Wang Simpanan Pekerja on or about October 1986 and a cheque for RM10,000 issued by the Kumpulan Wang Simpanan Pekerja in favour of the developer; and

(b) on 11 June 1987, the plaintiff and the defendant, on the one part, executed a loan agreement with Citibank N.A., on the other part, for a loan in the sum of RM15,000 (hereinafter referred to as the "loan amount") in order to assist the plaintiff to complete the purchase of the property.

[8] Now, on 11 June 1987, a deed of assignment in respect of the property was executed between the plaintiff and the defendant, on the one part, and Citibank, N.A., on the other, whereby the rights to the property, its title and interest therein were assigned to Citibank, N.A. Pursuant to cl. 4(a) of the loan agreement, the plaintiff was required to make the monthly payments in the sum of RM248.37 after the whole of the loan being fully released by Citibank, N.A. to the developer. Citibank, N.A. duly disbursed the sum of RM15,000 to the developer whereupon the plaintiff commenced honouring the monthly payments of RM248.37 pursuant to the terms and conditions of the loan agreement. On or about 31 July 1993, the plaintiff issued a final lump sum payment in the sum of RM5,500 as full and final settlement of the loan amount. It must be emphasised that, at no time, did the defendant contribute any monies whatsoever to the payment of the purchase price of the property nor did the defendant pay or contribute to the payment of RM248.37 as monthly payments in respect of the loan agreement. The defendant is unemployed and is illiterate and has no means of paying the monthly payments in respect of the loan agreement let alone the actual purchase price of the property. The defendant is a plain housewife dependent entirely on the plaintiff. What a pity!

The Issuance Of The Title To The Property

[9] On 30 September 1994, the plaintiff and the defendant were issued with the strata title in respect of the property. Upon completion of the monthly payments in respect of the loan agreement, a deed of receipt and re-assignment in respect of the

property was executed between the plaintiff and the defendant, on the one part, and Citibank, N.A., on the other part, on 28 October 1995. With the execution of the deed of receipt and re-assignment, all rights in respect of the property were re-assigned to the defendant and the plaintiff as co-owners of the property of which 50% share in the name of the defendant in the property was held on trust for the plaintiff.

The Dispute

[10] Towards the end of 2004, the plaintiff discovered that the defendant had prepared a transfer form in respect of the 50% share of the property in her name to be transferred to Sahar bin Abdul Manap. The transfer form has yet to be filed with the land office. Alarmed at this turn of event, the plaintiff immediately informed the defendant that he was not agreeable to the transfer of the 50% share of the property in the name of the defendant to Sahar bin Abdul Manap since the 50% share of the property in the name of the defendant is held in trust for the plaintiff as the sole beneficiary.

[11] A dispute arose. In the light of the disagreement and breakdown in relationship between the parties, the plaintiff was compelled to institute legal proceedings against the defendant seeking for the declarations and the order as stipulated in enclosure one (1).

The Principal Issue

[12] Only one issue can be discerned. It is this. Whether the plaintiff has satisfied the burden of proof that there is a resulting trust in favour of the plaintiff? I would answer this question in the affirmative.

[13] A resulting trust is defined in the *"Words And Phrases Legally Defined, volume 4: R-Z"* as follows (see p. 337):

> **Resulting trust**
> A resulting trust may arise solely by operation of law, as where, upon a purchase of land, one person provides the purchase money and the conveyance is taken in the name of another: there is then a resulting trust in favour of the person providing the money, unless from the relation between the two, or from other circumstances, it appears that a gift was intended. There is also another class of resulting trusts, where the creation of the trust is express, although in the events which happen, the beneficial destination of the property is undetermined. This is the case

where there is an entire or partial failure of the objects of the trust, and then, to the extent of the failure, the benefit of the trust results to the settlor or his representatives. (16 *Halsbury's Laws* (4th edn) para 1453).

[14] Further down at the same page, the learned authors wrote and I gratefully adopt them in this judgment:

A resulting trust is a trust arising by operation of law:

(1) where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or in part; or

(2) where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or

(3) where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.

In all these cases, except where the failure of a declared trust arises from the illegality of the object, and the trustee relies on the maxim in *pari delicto potior est conditio possidentis*, the beneficial interest in the property, so far as not applicable to any sufficiently expressed or indicated beneficiary or object, results or reverts to the disposer or purchaser of the property or, in the case of his previous death, to his representatives. (48 *Halsbury's Laws* (4th edn) para 597) 'If it is intended to have a resulting trust, the ordinary and familiar mode of doing that is by saying so on the face of the instrument; and I cannot get, out of the language of this instrument, a resulting trust except by putting in words which are not there. I must say I for one have always protested against endeavouring to construe an instrument contrary to what the words of the instrument itself convey, by some sort of preconceived idea of what the parties would or might or perhaps ought to have intended when they began to frame their instrument.' *Smith v. Cooke, Storey v. Cooke* [1891] AC 297 at 299, per Lord Halsbury LC.

[15] It follows therefore that where on a purchase, like the present case at hand, a property is conveyed into the name of someone other than the purchaser, there is a resulting trust in favour of the person who advances the purchase money. Eyre CB in *Dyer v. Dyer* [1788] 2 Cox Eq. 92 at 93 stated the law in this way:

> The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffor.

[16] And the same principle of law would apply to pure personalty as well as to land (*Re Scottish Equitable Life Assurance Society* [1902] 1 Ch. 282; and *The Venture* [1908] P. 218).

[17] The burden falls on the plaintiff to prove payment in respect of the property in order to establish the existence of the resulting trust. In my judgment, the plaintiff has proved payment in respect of the property in the light of the following facts:

(a) the plaintiff withdrew the sum of RM10,000 from the Kumpulan Wang Simpanan Pekerja on or about October 1986 in favour of the developer;

(b) on 11 June 1987, the plaintiff and the defendant, on the one part, executed a loan agreement with Citibank, N.A., on the other part, for a loan in the sum of RM15,000 in order to enable the plaintiff to complete the purchase of the property;

(c) that pursuant to cl. 4(a) of the loan agreement, the plaintiff was required to make the monthly payments in the sum of RM248.37 one month after the date of the whole of the loan being fully released by Citibank, N.A. to the developer;

(d) that Citibank, N.A. duly disbursed the sum of RM15,000 to the developer whereupon the plaintiff commenced honouring the monthly payments of RM248.37 pursuant to the terms and conditions of the loan agreement as evidenced by the monthly receipts issued by the said bank;

(e) that on or about 31 July 1993, the plaintiff on his own accord issued a final lump sum payment in the amount of RM5,500 as full and final settlement of the loan amount to the said bank; and

(f) that at no time did the defendant contribute any monies whatsoever to the payment of the purchase price of the property nor did the defendant make payment of the sum of

RM248.37 on a monthly basis in respect of the loan agreement.

[18] I reiterate and it is part and parcel of my judgment that there is a resulting trust in existence in respect of the property to which the plaintiff is the sole beneficiary.

Adequate Notice Given To The Defendant

[19] I have mentioned that the defendant has failed to enter an appearance and has also failed to file an affidavit in reply. It is apparent that the defendant has been given adequate notice of the proceedings by way of personal service on 22 September 2005 at 12.45pm and the notice of the hearing date on 6 September 2005 at 10.45am pursuant to O. 10 r. 1 of the Rules of the High Court 1980 ("RHC") read together with O. 10 r. 5 of the RHC. (See the affidavit of service affirmed by Asrul bin Sujak on 25 July 2005 at para. 3 and another affidavit of service affirmed by Mohamed Shufi bin Shuib on 7 September 2005 at paras 2 and 3 thereof).

Material Averments Not Refuted

[20] The failure to file an affidavit in reply by the defendant in order to refute the plaintiff's averments must be construed against the defendant. All the plaintiff's averments are deemed to be the truth (*Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609, CA; and *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529, FC).

Conclusion

[21] It is obvious that the conclusion to this short judgment would be as follows:

(1) that there is a resulting trust in respect of the property in favour of the plaintiff who is the sole beneficiary;

(2) that the plaintiff has succeeded in proving payment of the purchase price of the property; and

(3) that the failure on the part of the defendant to file an affidavit in reply would categorically show beyond per adventure that the property is held on resulting trust for the sole benefit of the plaintiff.

[22] I must grant an order in terms of the originating summons in enclosure one (1). I do so accordingly.